

Legal Protection of Minor against Abuse by its Guardian in Bangladesh: A Comparative Study

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Abstract

Infant is an easy pray to the abuse and corruption of the persons under whom he/she lives with. For rearing them up every religion has special provision. Not only that state has separate laws for their protection. In Bangladesh these laws are found inoperative while they are abused and deprived of their proprietary rights by their guardians. But the provisions of Roman laws were strong enough to protect the infants from the inefficiency, corruption and abuse of their guardians in comparison to that of Bangladesh. This article is aimed at providing information and materials to the legislators of Bangladesh for making existing laws more effective to protect and preserve infants' interest.

Keywords: Infant, minor, rights, security, interest, abuse, guardianship, misuse, authority, guardian

1. Introduction

A child of today is the future of tomorrow. In order to create a better future child should be brought up in certain atmosphere where no question arises regarding the want of food, clothing, shelter, education and health care of him/her. Usually parents are responsible for raising their issues up and bringing them up as sound citizens having good moral and ethical values. In certain cases it is not possible because of unawareness and illiteracy of the parents. Sometimes it is not possible when the parent dies or leaves their children alone. In the latter cases the responsibility lies with other guardian who may be appointed by a natural guardian or the court. The guardians look after and take care of the person and property of the child. Sometimes they do not perform their duties cordially and sincerely. As a result the minors are abused and deprived of their legitimate rights and interests. When legitimate rights and interests of children are snatched away by their guardian or by third party owing to the failure to take proper action by the guardian, there is no remedy for child in respect of person and there has been little redress in respect of proprietary interest provided that the infant after attaining majority must seek the assistance of the court. Nowhere in Muslim and Hindu laws, guardians are held personally responsible for the abuse of minor and in some cases regarding proprietary interest of the minor, guardians are considered responsible but penalty is to be borne by the transferee by way of surrendering their property received from the guardian in which the minor had legal interest. (Solema Bibi v. Hafeez Mohamed, Maladin v. Ahmed) In contrast, in Roman law there were certain provisions which were made to protect the interest of the pupil against third party and in some cases the guardian himself was held responsible and was bound to bear losses incurred by minor owing to his negligence and carelessness. (Kabir, 1963)

This study aims at making a comparison of Muslim, Hindu and statutory laws of Bangladesh in respect to the status of minor and guardian; powers and functions of guardian. At the end this study intends to find out the defenses of minors against the mistreatment by guardians recognized in Muslim, Hindu, statutory and Roman laws, and adjudicate which one is better. Since it appears that provisions to protect the interest of minors are effective in Roman law, the article discussed Roman law on this issue only. Thereby this article provides necessary information to the legislator so that they can take appropriate measures to amend the existing guardianship law or legislate a new one where the wards' personal and proprietary interests may be secured against the guardian.

1.1.1. Research Questions

Q1: Is the law of Bangladesh sufficient enough to protect the rights and interests of minor against their guardian?

Q2: Is this law required to be amended for the greater interests of minor?

1.1.2 Research Objectives

The goals of this research are to:-

- > Make a comparison of Muslim, Hindu and statutory laws of Bangladesh in respect to the status of minor and guardian; powers and functions of guardian.
- > Find out the loopholes, weaknesses and shortcomings of these laws.
- > Assert the completeness of Roman law in this regard.

1.1.3 Research Hypothesis

The author determines the following hypotheses for the research-

- a) The laws regarding the protection and preservation of minor's rights and interests existing in Bangladesh are not sufficient enough to them from the misuses by their guardian.
- b) These laws are required to be amended taking protective provisions from the Roman guardianship laws.

1.2 Minor in Bangladesh

In Muslim Personal law persons below the puberty age are minors. Both in Sunni and Shi'a schools person below the age of puberty is a minor which may be determined as 15 years.(Chawdhury, 1998) According to section 12(1) of the Muslim Family Laws Ordinance, 1961 a person below 16 years of age is a minor.

In traditional Hindu law persons below the age of 15 years in Dayabhaga School and in Mitakshara School persons below the age of 16 years are minors.(Mullah, 1990)

According to section 3 of the Majority Act, 1875 age limit of minors is 18 years and if in any case the minor or his property remains under the guardianship of any person appointed by court and where the property is undertaken by court of ward under Guardian and Wards Act, 1890 in that case persons below the age of 21 are minors.(The Act of 1875)

1.3 Guardian

Guardian is a person who is to look after the person and property of the minor. A guardian is always expected to be physically and mentally sound, and at the same time he must be a major one. Guardian is of two types viz., (1) guardian of person of the minor and (2) guardian of property of the minor. Male and female both are eligible for guardian.

1.3.1 Guardian in Muslim Law

In Muslim personal law agnatic relations are appointed as guardian of the property of the minor. Usually father and in his absence grandfather is responsible for guardianship of the child. In their absence quality and soundness of person is chosen for guardianship. In Muslim law guardianship of minor is of two types- guardianship of person and guardianship of property of minor. Guardianship of person of minor generally rests on the mother or in mother's absence maternal grandmother and thereafter maternal and paternal female relatives of the minor. However maternal relative is given preference over the paternal one.(Hamilton, 1957) In their absence male kindred may perform this act. In respect of guardianship of person female relatives are appointed.(Hamilton, 1957) However, remarriage of mother to a stranger (person other than relations of the husband's family) disqualifies her from being appointed as guardian. There is a time limit to the action of the female guardian. In respect of boy child the duration is seven years and in respect of girl child the duration is until she attains the age of puberty. After that period, person of the infant too comes into the hand of male guardians.(Hamilton, 1957) However, female role is very limited in respect of property matter of the minor. Nothing is said about the age limit of guardian. However the guardian is to be a major one.

In personal Muslim law guardian is of three types:-viz.

- (1) Natural guardian
- (2) Testamentary guardian
- (3) Guardian appointed by Qazi.

1. Natural guardian: Usually father and in his absence grand father is natural guardian.(Ali, 1965)
2. Testamentary guardian: Executor appointed by father and if there exists no such executor in that case guardian appointed by grand father by will is called testamentary guardian.(Ali, 1965)
3. Guardian appointed by Qazi: Generally such Qazi or judge as representative of government appoints guardian among male agnates of the deceased father or grand father if found suitable in preference to a stranger.(Ali, 1965)

In Sunni school testamentary guardian appointed by father in his absence is given priority over grandfather.(Ali, 1965) In Shi'a school grandfather's guardianship prevails upon testamentary executor appointed by the late father.(Ali, 1965)

1.3.2 Guardian in Hindu Law

In respect of Hindu community agnatic relations are responsible for guardianship of their children. In their absence honest, sincere and morally and physically sound person is chosen as a guardian. However at the time of selection of guardian of person benefit of the minor is considered. If the minor is mature in that case his/her opinion is given priority for selecting his or her guardian.

In Hindu law guardians may be divided into three classes, namely

- a) Natural guardian,
 - b) Guardian appointed by a father by will.
- 1) Natural guardian: Both in Dayabhaga and Mitakshara schools father is the natural guardian of person and property of minor. In the absence of father, mother fills up that vacuum if no testamentary executor is appointed by father. In the absence of both, guardianship is carried on by paternal kinsman in degree of nearness and in their absence maternal relations. Some time maternal relations are given priority over paternal one.
 - 2) Guardian appointed by a father by will: Father may by will appoint any person to be the guardian of his minor child in preference to his wife i.e. the mother of the minor.

1.3.3 Guardian in Statutory Laws

The Guardians and Wards Act, 1890 applicable to the citizens of Bangladesh sings with the same tune with guardianship provision of traditional Muslim law. Here one innovation is made and that court is given the power to appoint any person as guardian for the welfare of the minor. By using these words “welfare of the minor” the highest court has denied the basic rules of Islamic law and Hindu Law. In the case of *Farhana Azad vs Samudra Ejazul Haque* case the High Court gave custody of two children aged 8 and 6 years respectively to their mother denying the authority of their father.(60 DLR) The fact of the case was that petitioner Farhana Azad and respondent Samudra Haque got separation on 23-4-2006. After the divorce respondent took second wife and kept the two children a daughter and a son with them. They decided to settle in USA. Minor’s mother, a school teacher, filed writ petition claiming the custody of her children which was accepted by the court.(60 DLR) In the case of *Rahamatullah vs Sahana Islam* the High Court appointed mother as guardian of the person and property of her minor son in preference to paternal grandmother and full paternal uncles.(54 DLR) The fact of the case said that minor’s father died leaving minor’s mother, paternal grandmother, full paternal uncles. After husband’s death minor’s mother married a stranger and kept her minor son with them. Minor’s paternal grandmother and paternal uncles filed suit demanding the custody of minor from mother.(54 DLR) In another case step mother was chosen fit over grandmother and full paternal uncles for the custody of person and property of minor son.(25 DLR) The fact of the case showed minor was the son of second wife of his father. When minor was nine months old minor’s mother was divorced and he was being brought up by step mother. When the minor was in class six his father died. After husband’s death minor’s step mother married another person. After marriage minor was taken care of by his step mother and step father. Minor’s paternal grandmother and full paternal uncles filed case to get the custody of the person and property of the minor.(25 DLR) In another case the High Court said where a minor has changed his or her religion different from that of his or her parents, the parents are declared unfit for guardianship of the apostate minor.(38 DLR) By these judgments court changed the basic principle of Muslim and Hindu laws and upheld what it thought to be the welfare of the minor.

1.4 Powers and functions of guardian

Guardian is to carry out some essential functions such as providing food, cloth, education, medicare, etc in taking care of the person of the minor. At the same time with the object of removing legal incapacity of the minor guardian enjoys some powers with regard to minor’s property.

1.4.1 Muslim Law

A guardian can sell the movable property of his ward for an adequate consideration and invest the proceeds in a profitable undertaking for the benefit of the minor. Guardian is allowed to borrow money for the support and education of his ward, even to pledge the minor’s property. All debts contracted validly and in *bona fide* intention for that purpose form a charge on the minor’s estate and have to be paid out of the same. It is lawful for a guardian to trade on account of his ward, but in doing so he must be careful not to go beyond the bonds of ordinary prudence or to engage in transactions which he has reason to believe are hazardous in their nature.(Amir Ali, 1965) A guardian is bound to keep his accounts separate from those of his ward, when the capital of both is engaged in the same trade or business.(Amir Ali, 1965) A guardian may not sell his wards real (immovable) property into his hands or into the hands of any one connected with him under any circumstance. He may sell it to a stranger for double its value or where it is in the manifest advantage of the ward. Here the guardian has to act *bonafide* intention and for the utmost benefit of the ward and for real necessity.(Amir Ali, 1965)

1.4.2 Hindu Law

In Hindu Law the guardians having custody of child have the duty to provide proper food, shelter, religious teaching, arrange proper education, and good manners is to be taught, moral and ethical values is also to be embedded in their mind. These types of guardians are not responsible for the management of pupil’s property but maintenance of such child is to be borne by the father. In his absence, other guardians having property provides maintenance.(Hamilton, 1957) Male guardian deals with ward’s property.

The natural guardian of Hindu minor has power in the management of his estate to mortgage or sell any part thereof in case of necessity or for the benefit of the estate. (Hanuman Persand v. Mussamat Babbbooe, 1856) Guardian has no power to impose personal obligation upon the minor or his estate except legal necessity or benefit of minor. He can make contract in respect of pupils property on the ground of necessity and of benefit of the ward. (Hanuman Persand v. Mussamat Babbbooe, 1856) If the alienee does not prove any legal necessity or he made reasonable inquiry at the time of transfer the sale is invalid. (Malappa v. Anant Bal Krishna, 1936) Guardian has no power to bind the minor's estate by a contract for the purchase of immovable property for minor. (Mullah, 1990)

A testamentary guardian's power is restricted to the provision of the will under which he gains his post. (Amir Ali, 1965) A guardian appointed by court has no authority to alienate or sell or mortgage any property of the ward without the previous permission of the court. (AIR, 1961) A managing member who is a guardian of the minor's joint family property is to protect the financial interest of minor. (In re, 1901, 25 Bom) In Hindu law general view is that the guardian of person of minor will provide proper food, clothing, shelter to the pupil and arrange proper education and also teach moral and ethical values and equip her/his pupil with good manners. Here if the guardian changes her/his religion different from the pupil in that case he/she may lose her/his guardianship. (Mullah, 1990) Where the child changes his/her religion in that case the wards opinion be considered regarding to whom she/he prefers to go.

1.4.3 Statutory Law

In Guardian and Wards Act, 1890 a guardian of the person of the ward is charged with the custody of the ward and must look to his support, health and education. A guardian of the property of a ward is bound to deal therewith as carefully as a man of ordinary prudence. He will take care of minor's property in such a manner as if he were the owner of the property. He will undertake all reasonable and proper action for the realization, protection or benefit of the property. In respect of transfer of property testamentary guardian's power is restricted by the conditions imposed by will. But guardian appointed by court must deal with it under supervision of the court. And he can't transfer without the permission of the court. The guardian shall give bond in prescribed form for the security of the property of the minor. The guardian is bound to follow the rules of bond. He shall provide statement of the total property of the minor and show his accounts to the court periodically. (Act, 1890)

1.5 Legal Action against Corruption:

It is expected that a guardian always performs his/her duty honestly and properly and protects the utmost proprietary interest of the ward. But if he fails to perform or refrain from his duty against the interest and wellbeing of the ward, what remedy lies with pupil against his/her guardian?

1.5.1 Legal Action in Muslim Law

In Muslim law there exists the Quranic protection against the abuse or conversion of minor's property by guardian. "Restore to the orphans" says the Quran, "when they come of age, their substance, do not substitute bad for good." Nor devour their substance by adding it to your own for this is an enormous crime." The Quran forbade the waste of the property of wards by their guardian. "And when ye deliver unto your wards their property, call witnesses thereof in their presence. Surely, they who devour the possession of orphans unjustly shall swallow fire hereafter." These strong Quranic protections have not been capitalized by the Muslim rulers in their concerned countries for the protection of minor. If the Muslim countries take proper legislative and administrative action to implement religious direction in that case it can be said that the rate of malpractice and corruption by the guardian will be reduced rapidly and the interest of the minor will be safe and secured.

It was also ordained that the Qazi should exercise a vigilant supervision over the guardians in the management of their wards property. However where the guardian fails to take care of person of minor properly he may be removed from his post and new one may be appointed. But in reality no guardian is removed from his post owing to not taking care of person of the minor. Regarding guardianship of property of minor, no guardian is allowed to alienate or transfer any property of the pupil either by sale, mortgage, lease or any other way except on the ground of legal necessity and benefit of the minor's property. If any transaction is made violating these rule the remedy lies with the minor is not against the guardian but against the alienee or transferee. (Solema Bibi v. Hafeez Mohamed, 1929) And the ward can only apply for the cancellation of such transaction, which goes against his interest within the period of three years after attaining majority. (Maladin v. Ahmed Ali, 1912)

1.5.2 Legal Action in Hindu law

In personal Hindu law it is said that the king shall protect the inherited and other property of a minor, until he has returned from his teacher's house or until he has passed his minority. (Manu, VIII) In Hindu law the religious protection is not as strong as that in Muslim law. Here the guardian of person of

pupil may be removed for his misconduct. But there is no protection against tutor in respect of property. Here the guardian is allowed to transfer ward's property on the ground of legal necessity and for the benefit of minor. But if these two principles are not followed the remedy for ward is to apply for the cancellation of those transactions made against his interest by guardian. Here the pupil has a limitation and that is his application may not be fruitful if the transferee or alienee can prove that he/she had made a proper inquiry and satisfied that there was legal necessity or benefit of the minor for such transactions. (Hunooman Persand v. Mussamat Babooee) There is no provision for minor for direct remedy against the guardian.

1.5.3 Condition of guardianship law in Bangladesh

In respect of remedy against corruption and abuse of the ward the Guardian and Wards Act, 1890 prescribes light punishment for the guardian. The first punishment is removal of the guardian. Where he violates any provision of the bond the court may sue to recover the breach. Where the guardian tries to keep the ward out of the authority of the court he shall be punished with fine which is not more than one thousand taka or punished with civil imprisonment which may not exceed six months. In respect of proprietary loss or damage because of contumacy of the guardian he shall be liable to fine which will not exceed one hundred taka for first offence and for continuous offence liable to pay fine not exceeding five hundred taka in total. In respect of the ward all the transactions made by the guardian regarding his property are voidable. The ward is allowed to file cancellation suit against the third party within three years after attaining majority but there is no provision wherein he can file suit against his guardian who has initially put him/her in trouble. (Act of 1908) But no remedy is available for minor against his/her guardian if he/she is physically abused.

1.5.4 Legal Action in Roman law

In protecting the interest of minor Roman law innovated some unique provisions which are unparalleled even at present day. The simplest remedy was discharge from the post. A guardian was removed from office for misconduct and if fraud was proved, the guardian was removed from office in a disgraceful manner. (Kabir, 1963) Where the guardian was other than natural he before entering upon the office was to submit security for guarantee of his sound behaviour and safety of wards' property. (Kabir, 1963) Again where the guardian was appointed by lower class magistrate he (guardian) too had to provide security for his good deeds and proprietary interest. Not only that three sound minded wealthy citizens had to be the guarantors for good behaviour of these guardians. (Kabir, 1963) In dealing with the property of the wards the guardian had to show proper diligence as if that was his own property. Where proprietary interest of the ward was hampered due to lack of prudence of the guardian, the guardian had to pay damages to redeem the loss. (Kabir, 1963) Where the guardian transferred ward's property in his name or in others name for real embezzlement, the ward was entitled to double compensation against his/her guardian. (Kabir, 1963) In some cases though real misappropriation or loss was not manifested but circumstantial losses were expected in future because of the guardians inefficiency, law allowed the ward to keep guardians own property as mortgage until his interest was recovered. (Kabir, 1963)

Beside these remedies ward had another remedy which he could use against the magistrate who, in spite of being aware of the misconduct and embezzlement of property of pupil, did not take appropriate measures or take adequate security from the tutor on appointment. (Kabir, 1963)

In order to protect pupil's interest the guardian had to make an inventory of all the ward's property before appointment of tutor. (Kabir, 1963) These safeguards were secured by the Roman state to her minors because she believed that minors were invaluable asset and if proper care and security was not provided this asset might be ruined i.e. minors would not grow up with good moral, and the state would lose better service from her future citizen. And that's why Roman people considered guardianship as public office and government had to supervise the working of the officials of this office. (Kabir, 1963)

1.6 Conclusion

In Bangladesh Muslim personal law and Hindu personal law contain provisions for the minor. The Court of Wards Act, 1890 was made to remove the loopholes of these personal laws. Muslim personal law terms person below the puberty age is a minor. In respect of age it considers a person below the age of 15 is a minor. In different schools of Hindu law person below the age of 15 and 16 years respectively are termed as minors. Statutory laws extended this age limit and say person below the age of 18 years are minors. However if the person or property of a minor is controlled by the court minority exists till the attainment of 21 years of age there. For taking care of the minor Muslim personal law appoints three categories of guardians, viz. natural guardian, testamentary guardian and guardian appointed by Qazi. Hindu personal allows only two types of guardians, viz. natural guardian and testamentary guardian. Statutory guardianship law admits all the guardians recognized in both Muslim and Hindu personal laws. However it authorizes the court to appoint any person as guardian in preference to natural and testamentary guardian in the name of betterment of the minor. With regard to duties and responsibilities of the guardian personal laws of Muslim and Hindu as well as statutory law bear the same provisions. These laws say that the guardian should look after the person and property of the minor properly and

diligently as if the minor is his/her own issue. However none of these laws is strong enough to protect the person and property of the minor if they are abused by his/her guardian. Roman law was self sufficient in this regard.

In Roman law artificial guardian had to carry out his duties properly and sincerely. They were given powers. Their application was questionable and punishable if it hampered the interests of the minors. In Hindu and Muslim laws guardians exercise certain powers and they are entrusted with some duties also. But no authority is found to scrutinize them. Although the existing law contains some provisions for supervision of the actions of the testamentary guardian and guardian appointed by court but the penalties available in case of violation of the provisions of that law are far less than Roman law. And ward had no remedy against the guardian for loss of his property except filing a suit of cancellation within three years after attaining majority. Here the personal laws of both Muslim and Hindu have no such mechanism.

Suggestion

The wisdom of Roman law lay in the moulding of concepts to serve practical purpose. The study of Roman law teaches the necessity for law to serve social purposes. It is therefore suggested that some amendments are made into the personal laws of Muslim and Hindu as well as the state legislation. The natural as well as other guardians in Muslim and Hindu laws should be entrusted with the powers and functions of the artificial Roman guardian. Natural guardian and other guardians should be punished with the same penalties that were recognized in Roman law. If these changes are brought about in the existing guardianship law then the rights and interests of the minor will be ensured and at the same time the guardian will keep himself away from any sort of misconduct, corruption, and misuse of ward.

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